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Supreme Court of the United States

OCTOBER TERM, 2004

ALBERT J. AVENAL, JR., et al.,
Petitioners,

– against –

THE STATE OF LOUISIANA and
THE DEPARTMENT OF NATURAL RESOURCES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This reply is respectfully submitted to the opposition of the State of Louisiana and The Department of Natural Resources (together, the "State") to the petition for certiorari. Notably, the State does not present any real opposition to the substantive claims raised by petitioners; it simply does not address petitioners' claims as to the tensions and confusion that characterize the many strands of this Court's takings jurisprudence and the need for clarification and resolution.

I. THE FEDERAL CONSTITUTIONAL QUESTION WAS RULED UPON BY THE LOUISIANA SUPREME COURT, AND THERE IS NO BAR TO THIS COURT'S REVIEW OF PETITIONERS' CLAIMS

The State's primary opposition to this petition for certiorari rests on its assertion that this Court should not consider petitioners' federal constitutional takings claim because petitioners, according to the State, intentionally waived it in earlier proceedings. The State is incorrect.

To make its point, the State indulges in a lengthy recitation of this matter's procedural history, nearly all of which is irrelevant because, as the State ultimately recognizes, this Court's jurisdiction is appropriate where a federal constitutional claim was addressed by a state's highest court. Here, there is no question that the Louisiana Supreme Court addressed and ruled on petitioners' federal constitutional claims; that court's opinion speaks for itself:

> Plaintiffs have also asserted a claim under the Fifth Amendment of the U.S. Constitution, which provides that "private property [shall not] be taken for public use,

> without just compensation." U.S. Constitution Amendment V; see also Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 307 n.1, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

A. 45. After engaging in extensive analysis of that federal takings claim, the court denied it. A. 45-47. Thus, the simple fact remains – uncontradicted by the record – that Louisiana's highest state court recognized and ruled on petitioners' federal claim, notwithstanding the State's attempt to smother it in layers of complex procedural history.

Moreover, to the extent that the State now asserts that the Louisiana Supreme Court only addressed the federal claim in error, we disagree. The State argues that a 1999 decision of Louisiana's intermediate Fourth Circuit appellate court had the effect of dismissing petitioners' federal claims.

That is, in 1999, after the federal Court of Claims, in a separate proceeding, granted summary judgment on a Fifth Amendment taking claim that petitioners raised there, the State subsequently moved for summary judgment in the state court action, claiming that collateral estoppel barred the re-litigation of issues decided by the federal judgment. The state trial court denied summary judgment, and the State appealed. The Court of Appeal of Louisiana, Fourth Circuit, denied the writ following rehearing and affirmed the judgment of the trial court. Avenal v. State, 757 So.2d 1, 9 (La.App. 4th Cir. 3/15/00)(McKay, J.)[1]

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[1] Initially, a split Fourth Circuit reversed, see Avenal v. State, 757 So.2d 1 (La.App. 4th Cir. 3/3/99) but the decision following rehearing – penned by the dissenting Judge – reached the opposite conclusion.

The State now asserts that the Fourth Circuit's decision permitted only state law claims to survive when the Fourth Circuit sent it back to the trial court for trial (Opposition Brief at pp. 2-4), but that opinion does not reflect such a limitation. To the contrary, the Fourth Circuit based its analysis on the fact that Louisiana law "does not recognize the doctrine of collateral estoppel," 757 So.2d at 11, and that, accordingly, there could be no issue preclusion:

> Since there has been no prior suit between the leaseholders and the Department of Natural Resources, even if collateral estoppel existed in Louisiana law, it is inapplicable by its own terms.

Id. Even if the State were correct that the Fourth Circuit had intended to dismiss the federal claims, the Louisiana Supreme Court was not bound by that lower court decision, as a collateral estoppel ruling by its own intermediate court probably could not, and here certainly did not, bar the Supreme Court of Louisiana from addressing the issue.

In sum, the State's claim of waiver, itself belatedly raised at this juncture,[2] is factually inaccurate, and, accordingly, its proposed bar to this Court's review is unsupportable on the record below. As set forth in the Petition, and hardly contested by the State, the Louisiana Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this Court, and this Court should grant review to resolve that question.

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[2] The State did not assert waiver in its opposition to petitioners' motion for rehearing in the Louisiana Supreme Court, which addressed the issue presented herein.

II. THE STATE'S ARGUMENT THAT CERTIORARI SHOULD BE DENIED BECAUSE THE LOUISIANA STATE COURT STATED A SEPARATE AND INDEPENDENT STATE LAW GROUND, BASED ON AN EXPANSIVE READING OF ITS POLICE POWERS AND BACKGROUND PRINCIPLES OF STATE LAW, DEMONSTRATES WHY CERTIORARI SHOULD BE GRANTED

Petitioners raised a second claim: that a state may not expand its reading of its own police powers or its "background principles" of property and nuisance law in order to eliminate exposure to valid federal takings claims. By framing its opposition in the context of Louisiana's law of prescription, the State underscores the fallacy of its own argument.

According to the State in its Opposition Brief at Point II, this Court should deny review because the Louisiana Supreme Court concluded, inter alia, that the oyster fishermen were not entitled to compensation because the State's action did not violate the takings clause of Louisiana's own state constitution. Because the case was decided "upon the Louisiana Supreme Court's construction of Louisiana law," the State reasons, there is no need for further review.

However, the State's logic is backwards: it is precisely because Louisiana's Supreme Court held that the state constitution provides narrower protection from takings than does the federal constitution that the State may not rely on an overly-expansive reading of its own "background principles" of property law to circumvent compliance with the broader Fifth Amendment requirements. That is, Louisiana may not deprive its citizens of federal constitutional protections, where they are broader than the guarantees of the state's constitution, by simply reading its own powers and "background principles" more expansively.

As set forth in petitioners'. Petition, the Louisiana Supreme Court incorrectly read the Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) exceptions stemming from a state's "background principles of state law of property and nuisance" and its police power; the State's argument now that Louisiana's civil law concept of prescription permits it to circumvent compliance with basic federal constitutional requirements may not be countenanced.

Certiorari should thus be granted to address whether, as the Louisiana Supreme Court has held, a State can expansively read its "police power" or its "background principles of the State law of property and nuisance" so as to eviscerate the Fifth Amendment's Just Compensation requirements.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT OVER HOW TO ASSESS THE DESTRUCTION OF THE VALUE OF PROPERTY HELD UNDER A LEASE UNDER THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT

The State offers little considered opposition to petitioner's substantive claims, simply concluding without any basis that petitioners leaseholds do not constitute a valid property interest, and then referring, without explanation or analysis, to this Court's decision in Tahoe-Sierra Preserv. v. Tahoe Reg. Planning, 535 U.S. 302 (2002) as somehow dispositive of the Fifth Amendment takings question presented here.

Of course, Tahoe endorsed the idea, long part of this Court's takings jurisprudence, of a lease as compensable property. 535 U.S. 302 at 322. However, the regulation imposing a temporary moratorium at issue in Tahoe did not, as the State suggests, dispose of the issue raised in petitioners' application for certiorari: whether the State's destruction of the economic value of a leasehold property interest should be

analyzed under a physical takings treatment or a regulatory takings analysis or a third hybrid of the two.

The State simply does not address petitioners' claims of confusion resulting from the various overlapping lines of analysis which have developed within this Court's takings jurisprudence, and which have caused significant disparities in treatment of parties whose property has been taken. In fact, the profound lack of clarity is most evident in the State's closing statement, which simultaneously conflates the standards employed in analysis of a nuisance claim, a physical takings claim, and a regulatory claim when it argues: "[T]he conclusion that Petitioners lacked a sufficient property right to support their takings claims is amply supported by this Court's precedents, including the government's recognized power to forestall 'grave threats to the lives and property of others.' Lucas, 505 U.S. at 1029, n.16." (Opposition Brief at 15)

This case presents issues that are arising frequently in land-use and compensation disputes across the country, and therefore this Court should grant certiorari to address the question of how leasehold property holdings should be treated when they are taken by State action.

CONCLUSION

This Petition raises important constitutional issues about which the law is in conflict. The Petition for a Writ of Certiorari should be granted.

April 29, 2005

Respectfully submitted,

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